No 58.

QUEEN'S BENCH,

LOWER CANADA.

APPEAL SIDE.

EDWARD CHAPMAN,

Appellant,

AND

CYRUS S. CLARK, ET AL,

Respondents.

APPELLANT'S CASE.

1856

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No 58.

QUEEN'S BENCH.

Province of Canada,
LOWER CANADA, TO WIT:

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

EDWARD CHAPMAN,
(Plaintiff in the Court below,)
APPELLANT.

AND

CYRUS S. CLARK, ET AL,
(Defendants in the Court below,)
RESPONDENTS.

APPELLANT'S CASE.

THIS Appeal is instituted from a judgment rendered by the Superior Court in the District of Saint Francis, on the 27th day of January last, dismissing the action of the Appellant, Plaintiff in the Court below.

The action was brought to recover the sum of £750 for damages sustained by the Appellant, in consequence of the Respondents, having, on the 10th and 17th days of June, 1855, by their agents and servants, unlawfully cut and loosened the Boom of the Appellant, erected on the River St. Francis, near Lennoxville, by means of which unlawful acts a large quantity of the timber of the Appellant was set adrift and became lost to him, and also that the timber of others with whom he had contracts for sawing was set adrift, so that the Appellant lost the profits that he would otherwise have made by sawing the same.

The Respondents fyled two exceptions and the general issue. By their first exception they allege that the River St. Francis is a navigable River, *navigable et flottable*, and that the Appellant's boom was an obstruction extending across the river, and one which the Respondents had a right to remove. In their second exception the Respondents set forth that they were possessed of timber limits contiguous to the river and above the saw mill and boom of the Appellant at Lennoxville, and of extensive saw mills some nine miles below the mill of the Appellant; that above their mill they had erected booms on the river to detain their saw-logs; that for the purpose of accumulating water in the river they had built a dam at the head of the river; that the Appellant placed his logs into the river before the "drive" of Respondents' logs, with a view of having them driven by their men; that as the water of the river was lowering they were obliged to use dispatch, and only opened the Appellant's boom after reasonable notice, and after he had refused to open it; that the Appellant's loss was trifling, and his logs might have been secured had it not been for his own neglect to co-operate with the Respondents in saving them, and that all the logs of the Appellant which went by his boom were secured by the booms of the Respondents and restored to the Appellant.

To these pleas the Appellant fyled general answers and replication.

After a mass of evidence had been adduced on both sides, the following judgment was rendered; viz:—

"The Court &c., seeing among other things that the Saint Francis is a navigable and floatable river, that "on the Tenth and Seventeenth days of June, one thousand eight hundred and fifty-five, Plaintiff's boom "constructed on said river, and stretching from one bank thereof to the other, unlawfully obstructed the nav-"igation of said river, and prevented Defendants' timber from passing down said river to their mills in the "Township of Brompton, and that Plaintiff neglected and refused to open said boom so as to allow Defen-"dants' said lumber to pass, is of opinion that said Defendants were justified in raising and opening said "boom so as to allow their said lumber to pass down said river, and that inasmuch as any logs belonging to "said Plaintiff or other persons which may have passed down said river with the lumber of said Defendants, "so passed down without any fault, neglect or misconduct of said Defendants, that said Defendants ought "not to be held to answer for the same, and doth consequently maintain the exception of said Defendants "and dismiss the action, &c."

The Appellant respectfully submits that he established in evidence the material allegations of his declaration and that no reason was shewn by Respondents, either as matter of law or fact, why judgment should not have been rendered in his favor. The evidence is somewhat conflicting, but the main facts of the Appellant's case remain unshaken, notwithstanding the multitude of witnesses—most of them their servants—brought forward by the Respondents. It is abundantly proved that on the 10th and 17th days of June, 1855, the Appellant had a large number of saw-logs in the river St. Francis, which were detained by his booms, that a considerable quantity of these logs were illegally sent adrift by the servants and workmen of the Respondents, on the first occasion by being passed under the boom, and upon the second by the boom being cut and loosened. These logs went down to the boom of the Respondent and were wholly lost to the Appellant. On the 10th of June when the Appellant's boom was raised and his logs passed under, Mr. Clark, one of the Respondents, was present and countenanced the operations of the men employed upon the "drive" of the

Respondents. On the 17th day of June it was the foreman of the Respondents who cut the boom. For these unjustifiable proceedings the Respondents had not even the plea of necessity. Had they shown half the anxiety to save the Appellant's logs that they did to set them adrift, no loss of any amount would have ensued, and the delay in getting down their own logs, would have been insignificant. They knew that none of their saw-logs were in danger, owing to their own boom being down the river, a fact which may furnish a key to their motives.

The amount of damage sustained by the Appellant in consequence of the illegal acts of the Respondents, could hardly, from the nature of the case, be exactly established. But it is proved to have been considerable, and cannot be estimated at a less sum than £125, for the logs lost by the Appellant, independent of those of other persons, which were to have been sawn at his mill.

It will be observed that the evidence adduced in the cause, establishes the fact that the Appellant had an opening in his boom and a "gateway" near the shore for the use of those requiring to pass the boom, so that it cannot be said that he wholly obstructed the river. The only object of his boom was to secure his own timber and that of the customers of his mill, although it is shown that upon one or two occasions it did good service to the Respondents, by holding their logs when there was danger of their being carried past their own boom.

The exception firstly pleaded by the Respondents that the St. Francis is a navigable river was not, as the Appellant maintains, established in evidence. Three witnesses were produced by the Respondents to prove the fact, but their testimony only shews that certain portions of the river may be used at certain times by flat-bottomed boats and for the floating of timber. The pretension is entirely at variance with the allegations of the Respondents that they have themselves erected a dam and booms across the river nine miles below the Appellant's mill and also a dam across the river near its source. The legal position which the Respondents wish to establish against the Appellant, would, if correct, have long since put an end to their lumbering operations on the St. Francis.

The Appellant is convinced that in law and justice he is entitled to a reversal of the judgment rendered by the Court below.

THOMAS W. RITCHIE,
For Appellant.

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for Appellant.